

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 147

[EPA-R08-OW-2007-0153; FRL-8733-4]

Fort Peck Assiniboine and Sioux Tribes in Montana; Underground Injection Control (UIC) Program; Primacy Approval and Minor Revisions

AGENCY: Environmental Protection Agency.

ACTION: Final Rule.

SUMMARY: EPA is approving an application from the Fort Peck Assiniboine and Sioux Tribes in Montana under Section 1425 of the Safe Drinking Water Act (SDWA) to implement an underground injection control (UIC) program for Class II (oil and gas-related) injection wells. EPA is also revising regulations that are not specific to the Fort Peck Tribes' application.

EFFECTIVE DATES: This approval is effective November 26, 2008. The incorporation by reference of certain publications listed in the regulations is approved by the Director of the *Federal Register* as of November 26, 2008.

ADDRESSES: EPA has established a docket for this action under Docket ID No. **EPA-R08-OW-2007-0153**. All documents in the docket are listed on the www.regulations.gov web site. Although listed in the index, some information is not publicly available, e.g., CBI or other information whose disclosure is restricted by statute. Certain other material, such as copyrighted

material, will be publicly available only in hard copy. Publicly available docket materials are available either electronically in www.regulations.gov or in hard copy in the Ground Water Program, EPA Region 8, 1595 Wynkoop Street, Denver, CO 80202-1129. This Docket Facility is open Monday through Friday, between 8:00 a.m. and 4:00 p.m., excluding legal holidays. The Docket telephone number is 303-312-6079.

FOR FURTHER INFORMATION CONTACT: Douglas Minter, U.S. Environmental Protection Agency, 8P-W-GW, 1595 Wynkoop Street, Denver, CO 80202-1129. Phone number: 303-312-6079. Email address: minter.douglas@epa.gov

SUPPLEMENTARY INFORMATION:

I. General Information

A. Regulated Entities

Category	Examples of Potentially Regulated Entities	North American Industry Classification System
State, Local, and Tribal Governments	State, local, and Tribal governments that own and operate Class II injection wells within the boundaries of the Fort Peck Indian Reservation.	924110

Category	Examples of Potentially Regulated Entities	North American Industry Classification System
Industry	Private owners and operators of Class II injection wells within the boundaries of the Fort Peck Indian Reservation.	221310
Municipalities	Municipal owners and operators of Class II injection wells within the boundaries of the Fort Peck Indian Reservation.	924110

This table is not intended to be exhaustive, but rather provides a guide for readers regarding entities likely to be regulated by this action. This table lists the types of entities that EPA is now aware could potentially be regulated by this action. Other types of entities not listed in the table could also be regulated. If you have questions regarding the applicability of this action to a particular entity, consult the person listed in the preceding **FOR FURTHER INFORMATION CONTACT** section.

II. Introduction

The Fort Peck Assiniboine and Sioux Tribes of Montana (the “Fort Peck Tribes”) applied to EPA under Sections 1422 and 1425 of the Safe Drinking Water Act (“SDWA”),

42 U.S.C. 300h-1 and 300h-4, for approval of the Fort Peck Tribes' program regulating Class II (oil and gas-related) underground injection wells on the Fort Peck Indian Reservation in Montana. Because the Fort Peck Tribes sought primacy only for the Class II UIC program, EPA is approving their program under SDWA section 1425. EPA's decision is based on a careful and extensive legal and technical review of the Tribes' application. As a result of this review, EPA has determined that the Fort Peck Tribes meet all requirements of section 1451 of the SDWA, including that the Tribes have demonstrated adequate jurisdictional authority over all Class II injection activities on the Reservation, including those conducted by nonmembers. EPA has also determined that the Tribes' program meets all applicable requirements for approval under SDWA section 1425, and that they are capable of administering an effective UIC Class II program in a manner consistent with the terms and purposes of the SDWA and all applicable regulations.

III. Legal Authorities

These regulations are being promulgated under authority of sections 1422, 1425, 1450 and 1451 of the Safe Drinking Water Act, 42 U.S.C. 300h-1, 300h-4, 300j-9 and 300j-11.

A. Requirements for State UIC Programs

Section 1421 of the SDWA requires the Administrator of EPA to promulgate minimum requirements for effective State UIC programs to prevent underground injection activities that endanger underground sources of drinking water ("USDWs"). Sections 1422 and 1425 of the SDWA establish requirements for States seeking EPA approval of State UIC programs.

States that seek approval for UIC programs under Section 1422 of the SDWA must demonstrate their UIC program is at least as stringent as the federal minimum requirements. EPA has promulgated a regulation setting forth the applicable procedures and substantive requirements. This regulation has been codified in the *Code of Federal Regulations* (40 CFR part 145). It includes requirements for State permitting programs (by reference to certain provisions of 40 CFR parts 124 and 144), compliance evaluation programs, enforcement authority, and information sharing.

For States that seek approval under Section 1425 of the SDWA, which provides an alternative set of requirements for Class II programs, EPA has published interim guidance in the *Federal Register* (46 FR 27333-27339, May 19, 1981), describing how States may apply for program approval under Section 1425 and setting forth the criteria EPA will use in approving or disapproving applications under this provision. By demonstrating that its program represents an effective program to prevent endangerment of USDWs and meets the more general statutory requirements of Section 1421(b)(1)(A) through (D), a State may obtain primacy for a Class II UIC program.

B. Tribal UIC Programs

Section 1451 of the SDWA and 40 CFR 145.52 authorize the Administrator of EPA to treat an Indian Tribe in the same manner as a State for purposes of the UIC program if the Tribe demonstrates that: (1) it is recognized by the Secretary of the Interior; (2) it has a governing body carrying out substantial governmental duties and powers over a defined area; (3) the functions to be exercised by the Tribe are within an area of the Tribal government's jurisdiction;

and (4) the Tribe is reasonably expected to be capable, in the EPA Administrator's judgment, of implementing a program consistent with the terms and purposes of the SDWA and applicable regulations.

Under Section 1451 of the SDWA and 40 CFR part 145, Subpart E, EPA is authorized to treat Indian Tribes similarly to States and may approve Tribal UIC programs. Tribes may apply for primacy under either or both Sections 1422 and 1425 of the SDWA, and the references in 40 CFR part 145 and EPA's May 19, 1981 interim guidance to "State" programs are also construed to include eligible "Tribal" programs. (See 40 CFR 145.1(h), which provides that all requirements of parts 124, 144, 145, and 146 that apply to States with UIC primacy also apply to Indian Tribes except where specifically noted.)

IV. Fort Peck Tribes' Application

On December 18, 1995, the Fort Peck Tribes submitted an initial application for primacy for all Class II wells on all lands within the exterior boundaries of the Fort Peck Indian Reservation (the "Reservation"). This application included comments received during the public comment period and hearing the Tribes held on September 20, 1995. On April 22, 1996, EPA determined that the Fort Peck Tribes' application was complete. On September 12, 1997, EPA published a notice in the *Federal Register* (62 FR 48086-48087) requesting initial comments and scheduling a public hearing on the application. A similar public notice was also published in newspapers in Great Falls, Billings, and Poplar, Montana. A public hearing was held on October 16, 1997, in Poplar, Montana. Public comments received by EPA and the Tribes, and EPA's and

the Tribes' responses to these comments, are summarized in the *Federal Register* notice of EPA's proposed approval of the Tribes' application noted under **VI. Response to Public Comments**. On February 12, 1998, EPA provided a set of formal comments to the Fort Peck Tribes for incorporation into their application. In response, the Fort Peck Tribes submitted a revised application on July 27, 1999, stating that the Fort Peck Tribal Executive Board had formally adopted underground injection control provisions in the Tribal Code and requesting primacy under both Sections 1422 and 1425 of the SDWA. Since this submission, EPA and the Tribes have: (1) conducted additional analyses which have been incorporated into EPA's Decision Document (see Section V) and the Tribes' application; and (2) updated their Memorandum of Agreement (MOA).

V. Explanation of This Action

After reviewing the very few public comments received on its January 30, 2008, proposal, EPA is approving the Fort Peck Tribes' Class II UIC program under SDWA Section 1425 with minor revisions to the Tribes' Program Description (PD) in their application. As a result, the Fort Peck Tribes will assume primary enforcement authority (except for the authority that EPA will retain to take criminal actions: (1) against non-Indians; and (2) against Indians where the potential fine required is greater than \$5,000 or where the penalty will require imprisonment for more than one year, in accordance with 25 U.S.C. 1302) for regulating all Class II injection activities on all lands within the exterior boundaries of the Reservation.

EPA's Decision Document in support of EPA's approval is part of the public record and

is available for public review. The Decision Document includes findings that the Fort Peck Tribes meet all requirements of section 1451 of the SDWA, including that the Tribes have demonstrated adequate jurisdictional authority over all Class II injection activities on the Reservation, including those conducted by nonmembers, and that the Fort Peck Tribes' program meets all applicable requirements for approval under section 1425 of the SDWA.

The Fort Peck Tribes will administer and enforce their Class II program with respect to all Class II injection wells on the Reservation. EPA is amending 40 CFR part 147 to revise the reference to the EPA-administered program for Class II injection wells on the Reservation to refer to the Fort Peck Tribes' Class II program. EPA will continue to administer its UIC program for Class I, III, IV, and V wells on the Reservation. (Although the Tribal Code prohibits injection in Class I, III, and IV wells, these prohibitions are separate from the Class II program that EPA is approving in this action.) As noted above, EPA will also retain Class II-related criminal enforcement authority against non-Indians on the Reservation, and against Indians on the Reservation where the potential fine required is greater than \$5,000 or where the penalty will require imprisonment for more than one year.

EPA will oversee the Fort Peck Tribes' administration of the Class II program on the Reservation. Part of EPA's oversight responsibility will include requiring quarterly reports of non-compliance and annual UIC program performance reports pursuant to 40 CFR 144.8. The Memorandum of Agreement between EPA and the Fort Peck Tribes requires, among other things, that EPA review all permits associated with aquifer exemptions not previously approved by EPA.

The provisions of the Tribal Code that contain standards, requirements, and procedures applicable to owners or operators of Class II wells on the Reservation are being incorporated by reference into 40 CFR part 147. Any provisions incorporated by reference, as well as all Tribal permit conditions or permit denials issued pursuant to such provisions, are enforceable by EPA pursuant to section 1423 of the SDWA and 40 CFR 147.1(e).

Cross Media Electronic Reporting Rule

EPA was recently made aware that its analysis of the Fort Peck Tribes' program with respect to 40 CFR 145.11 in its proposed Decision Document for this action did not include a discussion of the Tribal program's consistency with 40 CFR 145.11(a)(33). 40 CFR 145.11(a)(33) requires that State programs under that part that "wish to receive electronic documents" have legal authority to implement 40 CFR Part 3, the Cross Media Electronic Reporting Rule (CROMERR) (see 70 FR 59879, October 13, 2005). CROMERR includes requirements applicable to States, Tribes, and local governments administering or seeking to administer authorized programs under Title 40 of the CFR where such programs receive electronic documents in lieu of paper to satisfy requirements under such programs. EPA has consulted with the Fort Peck Tribes and determined that the Tribes' UIC Program does not accept electronic copies of official documents or records, and therefore has concluded that the Tribes' program is consistent with 40 CFR 145.11(a)(33).

VI. Response to Public Comments

EPA published its proposal to approve the Fort Peck Tribes' application in the *Federal*

Register on January 30, 2008. As part of its proposal, EPA requested public comment and announced that a public hearing would be held on February 25, 2008. The public comments received, and EPA's responses to them, are summarized below.

Comment: One Class II injection well owner/operator objected to Tribal regulation of non-tribally owned and operated wells located on fee land within the Reservation.

Response: EPA carefully considered the Tribes' application under the statutory and regulatory framework set out in the SDWA and at 40 CFR 145.52 and concluded that the Tribes have demonstrated adequate jurisdictional authority over all Class II injection well activities within the exterior boundaries of the Reservation, including those conducted by non-Tribal members on fee lands. Detailed findings that form the basis of this conclusion are included under **Section VIII. Generalized Findings** and in EPA's Decision Document supporting EPA's approval of the Tribes' application, which is available for public review.

Comment: This commenter also expressed concern that Tribal regulation of its Class II injection well would enable the Tribes to require that: 1) only Tribal members be hired to operate and maintain this well; and 2) tribal employment-related monetary payments be made to the Tribes. This commenter stated that if the Tribes did regulate their Class II injection well, EPA should explicitly state in its authorization that Tribal employment or related monetary payments will not become a condition in the UIC permit.

Response: This comment raises issues that are outside the scope of EPA's action approving the Tribes' program. Employment rights and authority to require monetary payments related to employment are outside the scope of EPA's Federal UIC program.

Comment: The Tribes described how their Office of Environmental Protection (OEP) has further enhanced its technical and administrative expertise and gained additional experience in assuming responsibility for Class II injection well program implementation since the original application was submitted. The Tribes also requested that the following sections of the Program Description (PD) in their application be updated: (1) OEP's two year projected budget for implementing its Class II injection well program; and (2) OEP's organizational chart.

Response: These two sections of the Tribes' PD have been updated. In addition, EPA noted in its January 30, 2008, proposal that the Tribes' original request for an aquifer exemption for the Dakota Sand formation did not reflect the Tribes' current intent, since the Tribes have subsequently decided not to pursue this exemption at this time. Consequently, reference to the Tribes' original request has been deleted from the PD.

Comment: The Bureau of Land Management (BLM) expressed its desire to develop a Memorandum of Understanding (MOU) with the Tribes for purposes of Class II injection well program implementation. Specifically, the BLM stated that it would like to encourage the Tribes to enter into a MOU with the BLM to delineate its trust responsibilities for Class II injection wells and ensure protection of tribal or allotted mineral resources on the Reservation. The BLM cited similar MOUs currently in place with EPA's and Montana's Class II injection well programs.

Response: EPA fully supports the development of a new MOU between the Tribes and the BLM, and has communicated to both parties that it is willing to assist in the development of this document.

VII. Other Changes to UIC Regulations

This rule includes the following revisions to 40 CFR 147.1 that are not specific to the Fort Peck Tribes: (1) revising 40 CFR 147.1 to include specific references to Tribal programs in light of the fact that EPA is approving its first Tribal UIC program; and (2) reserving 40 CFR 147.1(f), because it duplicates 40 CFR 9.1. EPA's regulations are codifying these minor revisions to account for the fact that such programs may be run by Tribes.

VIII. Generalized Findings

As described earlier, EPA's decision to approve the Fort Peck Tribes to implement a Class II UIC program includes findings that the Tribes meet all requirements of section 1451 of the SDWA, including that the Tribes have demonstrated adequate jurisdictional authority over all Class II injection activities on the Reservation, including those conducted by nonmembers. With regard to authority over nonmember activities on nonmember-owned fee lands, EPA finds that the Tribes have demonstrated such authority under the test established by the United States Supreme Court in *Montana v. United States*, 450 U.S. 544 (1981) (*Montana* test). Under the *Montana* test, the Supreme Court held that absent a Federal grant of authority, Tribes generally lack inherent jurisdiction over the activities of nonmembers on nonmember-owned fee lands. However, the Court also found that Indian Tribes retain inherent sovereign power to exercise civil jurisdiction over nonmember activities on nonmember-owned fee lands within the reservation where: (1) nonmembers enter into "consensual relationships with the Tribe or its members, through commercial dealing, contracts, leases, or other arrangements" or (2)

“...[nonmember] conduct threatens or has some direct effect on the political integrity, the economic security or the health or welfare of the Tribe.” *Id.* at 565-66. In analyzing Tribal assertions of inherent authority over nonmember activities on Indian reservations, the Supreme Court has reiterated that the *Montana* test remains the relevant standard. See e.g., *Strate v. A-1 Contractors*, 520 U.S. 438, 445 (1997) (describing *Montana* as “the pathmarking case concerning Tribal civil authority over nonmembers”); *Nevada v. Hicks*, 533 U.S. 353, 358 (2001) (“Indian Tribes’ regulatory authority over nonmembers is governed by the principles set forth in [*Montana*]”); *Plains Commerce Bank v. Long Family Land & Cattle Co., Inc.*, 128 S.Ct. 2709 (2008).

As part of the public record available for review, EPA’s Decision Document, and Appendix A thereto, sets forth the Agency’s specific factual findings relating to the Tribes’ demonstration of inherent authority over the UIC Class II activities of nonmembers under the *Montana* test and, in particular, the potential for direct effects of nonmember UIC activities on the Tribes’ health, welfare, political integrity, and economic security that are serious and substantial. In addition, EPA is publishing the general findings set forth below regarding the effects of underground injection activities. These general findings provide a backdrop for EPA’s analysis of the Tribes’ assertion of authority under the *Montana* test and, in effect, supplement the Agency’s factual findings specific to the Fort Peck Tribes and to the Fort Peck Reservation.

A. *General Finding on Human Health and Welfare, and Economic and Political Impacts.*

In enacting part C of the SDWA, Congress generally recognized that if left unregulated or improperly managed, underground injection can endanger drinking water sources and thus has

the potential to cause serious and substantial, harmful impacts on human health and welfare, and economic and political interests. As stated in the legislative history of the SDWA:

[U]nderground injection of contaminants is clearly an increasing problem.

Municipalities are increasingly engaging in underground injection of sewage, sludge, and other wastes. Industries are injecting chemicals, byproducts, and wastes. Energy production companies are using injection techniques to increase production and to dispose of unwanted brines brought to the surface during production. Even government agencies, including the military, are getting rid of difficult to manage waste problems by underground disposal methods. Part C is intended to deal with all of the foregoing situations insofar as they may endanger USDWs.¹

In response to the problem of the substantial risks inherent in underground injection activities, Congress enacted section 1421 of the SDWA “to assure that drinking water sources, actual and potential, are not rendered unfit for such use by underground injection of contaminants.”²

In enacting the SDWA, Congress also generally found that waste disposal practices, including mismanaged underground injection activities, could have serious and substantial, harmful impacts on human health and welfare, and economic and political interests. For example, Congress found that:

¹See H.R. Report No. 93-1185, 93rd Congress, 2nd Session (1974), reprinted in “A Legislative History of the Safe Drinking Water Act,” February, 1982, by the Government Printing Office, Serial No. 97-9, page 561.

Federal air and water pollution control legislation have increased the pressure to dispose of waste materials on or below land, frequently in ways, such as subsurface injection, which endanger drinking water quality. Moreover, the national economy may be expected to be harmed by unhealthy drinking water and the illnesses which may result therefrom.³

Congress specifically noted several economic and political consequences that can result from the degradation of good quality drinking water supplies, including: (1) inhibition of interstate tourism and travel; (2) loss of economic productivity because of absence from employment due to illness; (3) limited ability of a town or region to attract workers; and (4) impaired economic growth of a town or region, and, ultimately, the nation.⁴

As the Agency charged by Congress with implementing part C of the SDWA and assuring implementation of effective UIC programs throughout the United States, EPA agrees with these Congressional findings. EPA finds that underground injection activities, if not effectively regulated, can have serious and substantial, harmful impacts on human health and welfare, and economic and political interests. In making this finding, EPA recognizes that: (1) the underground injection activities, currently regulated as five distinct classes of injection wells as defined in the UIC regulations, typically emplace a variety of potentially harmful organic and inorganic contaminants (e.g., brines and hazardous wastes) into the ground; (2) these injected contaminants have the potential to enter USDWs through a variety of migratory pathways if

²Id., page 560.

³Id., page 540.

injection wells are not properly managed; and (3) once present in USDWs, these injected contaminants can have harmful impacts on human health and welfare, and economic and political interests, that are both serious and substantial.

In 1980, EPA issued a document entitled, “Underground Injection Control Regulations: Statement of Basis and Purpose,” which provides the rationale for the Agency in proposing specific regulatory controls for a variety of underground injection activities. These controls, or technical requirements (e.g., testing to ensure the mechanical integrity of an injection well), were promulgated to prevent release of pollutants through the six primary “pathways of contamination,” or well-established and recognized “ways in which fluids can escape the well or injection horizon and enter USDWs.”⁵ EPA has found that USDW contamination from one or more of these pathways can occur from underground injection activity of all classes (I - V) of injection wells.

The six pathways are:

1. migration of fluids through a leak in the casing of an injection well and directly into a USDW;
2. vertical migration of fluids through improperly abandoned and improperly completed wells in the vicinity of injection well operations;
3. direct injection of fluids into or above a USDW;
4. upward migration of fluids through the annulus, which is the space located

⁴Id., page 540.

⁵ “Underground Injection Control Regulations: Statement of Basis and Purpose,” EPA, (May, 1980), page 7.

between the injection well's casing and the well bore. This can occur if there is sufficient injection pressure to push such fluid into an overlying USDW;

5. migration of fluids from an injection zone through the confining strata over or underlying a USDW. This can occur if there is sufficient injection pressure to push fluid through a stratum, which is either fractured or permeable, and into the adjacent USDW; and
6. lateral migration of fluids from within an injection zone into a portion of that stratum considered to be a USDW. In this scenario, there may be no impermeable layer or other barrier to prevent migration of such fluids.⁶

Moreover, consistent with EPA's findings, the U.S. Department of the Interior has recognized the ability of injection wells to contaminate surface waters that are hydrogeologically connected to contaminated ground water.⁷ Such contamination of surface waters could further cause negative impacts on human health and welfare, and economic and political interests.

In sum, EPA finds that, given the common presence of contaminants in injected fluids, serious and substantial contamination of ground water and surface water resources can result from improperly regulated underground injection activities. Moreover, such contamination has the potential to cause correspondingly serious and substantial harm to human health and welfare, and economic and political interests. EPA also has determined that Congress reached a similar

⁶"Underground Injection Control Regulations: Statement of Basis and Purpose," EPA, (May, 1980), pp. 7-17.

⁷See Federal Water Quality Administration's Order COM 5040.10 (1970), as referred to

finding when it enacted part C of the SDWA, directing EPA to establish UIC programs to mitigate and prevent such harm through the proper regulation of underground injection activities.

B. General Finding on the Protection of Safe Drinking Water Sources as Necessary to Protect Self-Government

Consistent with the finding that improperly managed underground injection activities can have direct harmful effects on human health and welfare, and economic and political interests that are serious and substantial, EPA has determined that proper management of such activities serves the purpose of protecting these human health and welfare, and economic and political interests. Protection of these interests is a core governmental function, the exercise of which is integral to, and is a necessary aspect of, self-government. See 56 FR 64876, 64879 (December 12, 1991); *Montana v. EPA*, 137 F.3d 1135, 1140-41 (9th Cir. 1998). EPA has determined that Congress reached this conclusion in enacting the SDWA, and that Congress considered the water quality protection functions authorized by the SDWA to be a necessary act of self government, serving to protect essential and vital public interests by ensuring that the public's essential drinking water sources are safe from contamination, including contamination caused by underground injection activities.

The above findings regarding the effects on human health and welfare, and economic and political interests are generally true for human beings and their communities, wherever they may be located. EPA has determined that the above findings are generally true for any Federal, State and/or Tribal government having responsibility for protecting human health and welfare. With specific relevance to Tribes, EPA has long noted the relationship between proper environmental

management within Indian country and Tribal self-government and self-sufficiency. Moreover, in the 1984 *EPA Policy for the Administration of Environmental Programs on Indian Reservations*, EPA determined that as part of the “principle of Indian self-government,” Tribal governments are the “appropriate non-Federal parties for making decisions and carrying out program responsibilities affecting Indian reservations, their environments, and the health and welfare of the reservation populace,” consistent with Agency standards and regulations. (*EPA Policy for the Administration of Environmental Programs on Indian Reservations*, Paragraph 2, November 8, 1984). EPA interprets section 1451 of the SDWA, in providing for the approval of Tribal programs under the Act, as authorizing eligible Tribes to assume a primary role in protecting drinking water sources. These general findings provide a backdrop for EPA’s legal analysis of the Fort Peck Tribes’ Application and, in effect, supplement EPA’s factual findings specific to the Fort Peck Tribes and to the Fort Peck Reservation, contained in the Decision Document and Appendix A thereto, and the Fort Peck Tribes’ similar conclusions, contained in their Application, pertaining specifically to the Fort Peck Tribes and the Fort Peck Reservation.

IX. Statutory and Executive Order Reviews

A. Executive Order 12866: Regulatory Planning and Review

This action is not a “significant regulatory action” under the terms of Executive Order 12866 (58 FR 51735, October 4, 1993) and is therefore not subject to review under the EO.

B. Paperwork Reduction Act

This action does not impose any new information collection burden. Reporting or record-

keeping requirements will be based on the Tribal Code, and the Fort Peck Tribes are not subject to the Paperwork Reduction Act. However, the Office of Management and Budget (OMB) has previously approved the information collection requirements contained in the existing regulations (40 CFR sections 144-148) under the provisions of the Paperwork Reduction Act, 44 U.S.C. 3501 et seq. and has assigned OMB control number 2040-0042. The OMB control numbers for EPA's regulations in 40 CFR are listed in part 9.

C. Regulatory Flexibility Act

The Regulatory Flexibility Act (RFA) generally requires an agency to prepare a regulatory flexibility analysis of any rule subject to notice and comment rulemaking requirements under the Administrative Procedure Act or any other statute unless the agency certifies that the rule will not have a significant economic impact on a substantial number of small entities. Small entities include small businesses, small organizations, and small governmental jurisdictions.

For purposes of assessing the impacts of this rule on small entities, small entity is defined as: (1) a small business that is primarily engaged in crude petroleum and natural gas extraction as defined by NAICS Code 211111 according to Small Business Administration size standards for entities employing fewer than 500 employees; (2) a small governmental jurisdiction that is a government of a city, county, town, school district or special district with a population of less than 50,000; and (3) a small organization that is any not-for-profit enterprise which is independently owned and operated and is not dominant in its field.

After considering the economic impacts of today's final rule on small entities, I certify

that this action will not have a significant economic impact on a substantial number of small entities. The small entities directly regulated by this final rule are owners or operators of Class II wells, employing fewer than 500 employees. We have determined that less than 7 small entities will experience an impact of greater than 1 percent of annual revenues. These entities will be subject to requirements substantially similar to the existing requirements of EPA's program under 40 CFR 147.1351(a) and will not incur significant new costs as a result of this rule. For example, the Tribes will charge an annual \$200 permitting fee for each Class II well on the Reservation. While this will impose a new cost on a small entity, this cost will not have a significant economic impact on a substantial number of small entities due to the few small entities owning/operating the 23 Class II wells on the Reservation. Moreover, in approving State UIC programs imposing similar fees on a greater number of small entities, EPA determined that these new costs did not have a significant economic impact on a substantial number of small entities.

Although this rule will not have a significant economic impact on a substantial number of small entities, EPA nonetheless has tried to reduce the impact of this rule on small entities. The Fort Peck Tribes' program is more stringent than the existing Federal program in certain respects. For example, unlike the existing Federal program, the Fort Peck Tribes' program requires permits for all Class II wells, with no provision for authorization by rule. (See section 202(c) of the Tribal Code.) However, because all Class II wells now in operation on the Reservation currently hold EPA permits, this more stringent requirement will not impose a significant economic impact on the owners or operators of these wells. Other requirements in the

Fort Peck Tribes' program that are more stringent than the existing Federal program are identified in the Decision Document available for public review and are mostly minor observation, recording, and reporting requirements. These requirements also will not impose a significant economic effect on the owners or operators of these wells.

D. Unfunded Mandates Reform Act

Title II of the Unfunded Mandates Reform Act of 1995 (UMRA), 2 U.S.C. 1531-1538, requires Federal agencies, unless otherwise prohibited by law, to assess the effects of their regulatory actions on State, local, and tribal governments and the private sector. Federal agencies must also develop a plan to provide notice to small governments that might be significantly or uniquely affected by any regulatory requirements. The plan must enable officials of affected small governments to have meaningful and timely input in the development of EPA regulatory proposals with significant Federal intergovernmental mandates and must inform, educate, and advise small governments on compliance with the regulatory requirements. The rule imposes no enforceable duty on any State, local or tribal governments or the private sector. EPA's approval of the Fort Peck Tribes' program will not constitute a "Federal mandate" because there is no requirement that Tribes establish UIC regulatory programs and because the program is a Tribal, rather than a Federal program. Thus, this rule is not subject to the requirements of sections 202 and 205 of the UMRA. In developing this rule, EPA consulted with small governments under a plan developed pursuant to section 203 of UMRA concerning the regulatory requirements in the rule that might significantly or uniquely affect small governments. The only small government directly affected by this rule is the Fort Peck Tribal

government. Accordingly, EPA has made the Tribes fully aware of the Federal requirements for approval to administer their own Class II UIC program; enabled the Tribes to have meaningful and timely input in the development of this rule; and informed, educated, and advised the Tribes on compliance with these requirements. However, the Tribal government is only implementing and complying with these regulatory requirements because it has: 1) voluntarily requested EPA approval to administer their own Class II UIC program; and 2) voluntarily assumed the Tribal share of the costs for doing so.

E. Executive Order 13132 - Federalism

Executive Order 13132, entitled “Federalism” (64 FR 43255, August 10, 1999), requires EPA to develop an accountable process to ensure “meaningful and timely input by State and local officials in the development of regulatory policies that have federalism implications.”

“Policies that have federalism implications” is defined in the Executive Order to include regulations that have “substantial direct effects on States, on the relationship between the national government and States, or on the distribution of power and responsibilities among the various levels of government.”

This final rule does not have federalism implications. It will not have substantial direct effects on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government, as specified in Executive Order 13132. This rule will merely put in place a Tribal regulatory program that is identical in many respects to the existing Federal program and more stringent in certain respects, as explained in more detail in the Decision Document. EPA will continue to

administer its Class I, III, IV, and V UIC programs on the Reservation. Authorizing the Fort Peck Tribes to administer the Class II program will not substantially alter the distribution of power and responsibilities among levels of government or significantly change EPA's relationship with Montana. The substitution of a Tribal Class II program in place of an EPA-administered Class II program on the Fort Peck Reservation will impose no additional costs on the State of Montana. Thus, Executive Order 13132 does not apply to this rule.

F. Executive Order 13175 - Consultation and Coordination with Indian Tribal Governments

Subject to the Executive Order 13175 (65 FR 67249, November 6, 2000) EPA may not issue a regulation that has tribal implications, that imposes substantial direct compliance costs, and that is not required by statute, unless the Federal government provides the funds necessary to pay the direct compliance costs incurred by tribal governments, or EPA consults with tribal officials early in the process of developing the proposed regulation and develops a tribal summary impact statement.

EPA has concluded that this action will have tribal implications. However, it will neither impose substantial direct compliance costs on tribal governments, nor preempt Tribal law. The Fort Peck Tribes have voluntarily requested EPA approval to administer their own Class II UIC program and have voluntarily assumed the Tribal share of the costs for doing so.

EPA consulted with tribal officials early in the process of developing this regulation to permit them to have meaningful and timely input into its development. EPA has made the Tribes fully aware of the Federal requirements for approval to administer their own Class II UIC program; enabled the Tribes to have meaningful and timely input in the development of this rule; and informed, educated, and advised the Tribes on compliance with these requirements. (See

Sections IV, V, and VI for more information.)

G. Executive Order 13045: Protection of Children from Environmental Health & Safety Risks

EPA interprets EO 13045 (62 FR 19885, April 23, 1997) as applying only to those regulatory actions that concern health or safety risks, such that the analysis required under section 5-501 of the EO has the potential to influence the regulation. This action is not subject to EO 13045 because it approves a tribal primary enforcement (primacy) program. The Fort Peck Tribes' Class II UIC program is more stringent than the existing Federal program; the Tribal program requirements have been established to prevent underground injection activities that endanger USDWs. The Fort Peck Tribal Executive Board has formally adopted underground injection control provisions in the Tribal Code in their program to safeguard these resources for all potential users, including but not limited to children.

H. Executive Order 13211: Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution, or Use

This action is not subject to Executive Order 13211 (66 FR 28355 (May 22, 2001)), because it is not a significant regulatory action under Executive Order 12866.

I. National Technology Transfer and Advancement Act

Section 12(d) of the National Technology Transfer and Advancement Act of 1995 ("NTTAA"), Public Law No. 104-113, 12(d) (15 U.S.C. 272 note) directs EPA to use voluntary consensus standards in its regulatory activities unless to do so would be inconsistent with applicable law or otherwise impractical. Voluntary consensus standards are technical standards

(e.g., materials specifications, test methods, sampling procedures, and business practices) that are developed or adopted by voluntary consensus standards bodies. NTTAA directs EPA to provide Congress, through OMB, explanations when the Agency decides not to use available and applicable voluntary consensus standards.

This action does not involved technical standards. Therefore, EPA did not consider the use of any voluntary consensus standards.

J. Executive Order 12898: Federal Actions to Address Environmental Justice in Minority Populations and Low-Income Populations

Executive Order (EO) 12898 (59 FR 7629 (Feb. 16, 1994)) establishes federal executive policy on environmental justice. Its main provision directs federal agencies, to the greatest extent practicable and permitted by law, to make environmental justice part of their mission by identifying and addressing, as appropriate, disproportionately high and adverse human health or environmental effects of their programs, policies, and activities on minority populations and low-income populations in the United States.

EPA has determined that this final rule will not have disproportionately high and adverse human health or environmental effects on minority or low-income populations because it increases the level of environmental protection for all affected populations without having any disproportionately high and adverse human health or environmental effects on any population, including any minority or low-income population. This final rule will put in place a Tribal regulatory program that is more stringent than the Federal program and, therefore, will increase the level of protection. For example, unlike the existing Federal program, the Fort Peck Tribes' program requires permits for all Class II wells, with no provision for authorization by rule.

Moreover, in approving the Tribes' own Class II program, EPA is enhancing the Tribes' ability to determine its own UIC affairs on its Reservation.

K. Congressional Review Act

The Congressional Review Act, 5 U.S.C. 801 et seq., as added by the Small Business Regulatory Enforcement Fairness Act of 1996, generally provides that before a rule may take effect, the agency promulgating the rule must submit a rule report, which includes a copy of the rule, to each House of the Congress and to the Comptroller General of the United States. EPA will submit a report containing this rule and other required information to the U.S. Senate, the U.S. House of Representatives, and the Comptroller General of the United States prior to publication of the rule in the *Federal Register*. A major rule cannot take effect until 60 days after it is published in the *Federal Register*. This action is not a "major rule" as defined by 5 U.S.C. 804(2). This rule will be effective November 26, 2008.

List of Subjects in 40 CFR part 147

Environmental protection, Indian-lands, Intergovernmental relations, Reporting and record-keeping requirements, Water supply, Incorporation by reference.

Dated: October 17, 2008.

Stephen L. Johnson,
Administrator.

For the reasons set out in the preamble, Title 40 chapter I of the Code of Federal Regulations is amended as follows:

Part 147--STATE, TRIBAL, AND EPA-ADMINISTERED UNDERGROUND INJECTION CONTROL PROGRAMS

1. The authority citation for part 147 is revised to read as follows:

Authority: 42 U.S.C. 300h *et seq.*; and 42 U.S.C. 6901 *et seq.*

2. Part 147 heading is revised as set forth above.

Subpart A--[AMENDED]

3. Section 147.1 is revised to read as follows:

§ 147.1 Purpose and scope.

(a) This part sets forth the applicable Underground Injection Control (UIC) programs for each of the States, territories, and possessions identified pursuant to the Safe Drinking Water Act (SDWA) as needing a UIC program, including any Indian country geographically located within those States, territories, and possessions.

(b) The applicable UIC programs set forth in this part may be State-administered programs approved by EPA, Tribally-administered programs approved by EPA, or Federally-administered programs promulgated by EPA. In some cases, the applicable UIC program for a particular area may consist of a State-administered or Tribally-administered program applicable to some classes of wells and a Federally-administered program applicable to other classes of wells. Approval of a State or Tribal program is based upon a determination by the Administrator that the program meets the requirements of section 1422 or section 1425 of the SDWA, any other applicable provisions of this subpart, and the applicable provisions of 40 CFR parts 124, 144, 145 and 146. A Federally-administered program is promulgated in those instances where the State or Tribe has not submitted any program for approval or where the submitted program does not meet the minimum Federal statutory and regulatory requirements.

(c) In the case of each State or Tribal program approved by EPA pursuant to section 1422 of the SDWA, the relevant subpart describes the major elements of that program, including the relevant State or Tribal statutes and regulations, the Statement(s) of Legal Authority, the Memorandum of Agreement, and the Program Description. State or Tribal statutes and

regulations that contain standards, requirements, and procedures applicable to owners or operators have been incorporated by reference pursuant to regulations of the Office of the *Federal Register*. Material incorporated by reference is available for inspection in the appropriate EPA Regional office, in EPA Headquarters, and at the National Archives and Records Administration (NARA). For information on the availability of this material at NARA, call (202) 741-6030, or go to:

http://www.archives.gov/federal_register/code_of_federal_regulations/ibr_locations.html. Other State or Tribal statutes and regulations containing standards and procedures that constitute elements of a State or Tribal program but do not apply directly to owners or operators have been listed but have not been incorporated by reference.

(d) In the case of any program promulgated under section 1422 for a State or Tribe that is to be administered by EPA, the relevant State or Tribal subpart makes applicable the provisions of 40 CFR parts 124, 144, 146, and 148, and any other additional requirements pertinent to the specific State or Tribal program.

(e) Regulatory provisions incorporated by reference (in the case of approved State or Tribal programs) or promulgated by EPA (in the case of EPA-administered programs), and all permit conditions or permit denials issued pursuant to such regulations, are enforceable by the Administrator pursuant to section 1423 of the SDWA.

(f) [Reserved].

Subpart BB--[AMENDED]

4. Section 147.1351 is amended by revising the first sentence of paragraph (a) and by revising paragraph (b) to read as follows:

§ 147.1351 EPA-administered program.

(a) *Contents.* The UIC program in the State of Montana for Class I, III, IV, and V wells, and for all Classes of wells in Indian country in Montana, except for Class II wells on all lands within the exterior boundaries of the Fort Peck Indian Reservation, is administered by EPA. * * *

(b) *Effective dates.* The effective date for the UIC program for Class I, III, IV, and V wells for all lands in Montana, including all Indian country in Montana, and for Class II wells for all Indian country in Montana other than the Fort Peck Indian Reservation, is June 25, 1984. The effective date for the EPA-approved State-administered UIC Class II program for all lands in Montana, except for those in Indian country, is provided in §147.1350.

5. Subpart JJJ is added to read as follows:

Subpart JJJ—Assiniboine and Sioux Tribes

§ 147.3200 Fort Peck Indian Reservation: Assiniboine & Sioux Tribes - Class II wells.

The UIC program for Class II injection wells on all lands within the exterior boundaries of the Fort Peck Indian Reservation is the program administered by the Assiniboine and Sioux (Fort Peck) Tribes approved by EPA pursuant to section 1425 of the SDWA. Notice of this approval was published in the *Federal Register* on October 27, 2008; the effective date of this program is November 26, 2008. This program consists of the following elements as submitted to EPA in the Fort Peck Tribes' program application:

(a) *Incorporation by Reference.* The requirements set forth in the Fort Peck Tribes' Statutes, Regulations, and Resolutions notebook, dated June 2008, are hereby incorporated by reference and made part of the applicable UIC program under the SDWA for the Fort Peck Indian Reservation. This incorporation by reference was approved by the Director of the

Federal Register in accordance with 5 U.S.C. 552(a) and 1 CFR part 51. Copies may be obtained or inspected at the Fort Peck Tribal Offices, 605 Indian Avenue, Poplar, Montana, 59255, (406) 768-5155, at the Environmental Protection Agency, Region 8, 1595 Wynkoop Street, Denver, Colorado, 80202-1129, (800) 227-8917, or at the National Archives and Records Administration (NARA). For information on the availability of this material at NARA, call (202) 741-6030, or go to:

http://www.archives.gov/federal_register/code_of_federal_regulations/ibr_locations.html.

(b) *Memorandum of Agreement (MOA)*. The MOA between EPA and the Fort Peck Tribes signed by EPA on July 31, 2007.

(c) *Statements of legal authority*. Letters to EPA from Sonosky, Chambers, Sachse, Endreson & Perry, dated September 4, 2003 (attaching a June 17, 2002 letter), March 27, 2001, July 19, 1999, March 13, 1995, March 16, 1994, November 4, 1992, July 14, 1989, and April 13, 1989, and letters submitted as part of the Fort Peck Tribes' application.

(d) *Program Description*. The Program Description submitted as part of the Fort Peck Tribes' application, and any other materials submitted as part of the application or as a supplement to it.